

SENATE BILL NO. \_\_\_\_\_ HOUSE BILL NO. \_\_\_\_\_

1 A BILL to amend and reenact § 2.2-4007 of the Code of Virginia and to amend the Code of  
2 Virginia by adding a section numbered 2.2-4007.1, relating to the Administrative  
3 Process Act; regulations impacting small businesses.

4 **Be it enacted by the General Assembly of Virginia:**

5 **1. That § 2.2-4007 of the Code of Virginia is amended and reenacted and that the Code**  
6 **of Virginia is amended by adding a section numbered 2.2-4007.1 as follows:**

7 § 2.2-4007. Notice of intended regulatory action; public participation; informational  
8 proceedings; effect of noncompliance.

9 A. Any person may petition an agency to request the agency to develop a new  
10 regulation or amend an existing regulation. The petition shall state (i) the substance and  
11 purpose of the rulemaking that is requested, including reference to any applicable Virginia  
12 Administrative Code sections, and (ii) reference to the legal authority of the agency to take the  
13 action requested. Within 14 days of receiving a petition, the agency shall send a notice  
14 identifying the petitioner, the nature of the petitioner's request and the agency's plan for  
15 disposition of the petition to the Registrar for publication in the Virginia Register of Regulations  
16 in accordance with the provisions of subsection B of § 2.2-4031. A 21-day period for  
17 acceptance of written public comment on the petition shall be provided after publication in the  
18 Virginia Register. The agency shall issue a written decision to grant or deny the petitioner's  
19 request within 90 days following the close of the comment period. However, if the rulemaking  
20 authority is vested in an entity that has not met within that 90-day period, the entity shall issue  
21 a written decision no later than 14 days after it next meets. The written decision issued by the  
22 agency shall include a statement of its reasons and shall be submitted to the Registrar for  
23 publication in the Virginia Register of Regulations. Agency decisions to initiate or not initiate  
24 rulemaking in response to petitions shall not be subject to judicial review.

25 B. In the case of all regulations, except those regulations exempted by §§ 2.2-4002, 2.2-  
26 4006, 2.2-4011, or § 2.2-4012.1, an agency shall provide the Registrar of Regulations with a  
27 Notice of Intended Regulatory Action that describes the subject matter and intent of the  
28 planned regulation. At least 30 days shall be provided for public comment after publication of  
29 the Notice of Intended Regulatory Action. An agency shall not file proposed regulations with  
30 the Registrar until the public comment period on the Notice of Intended Regulatory Action has  
31 closed.

32 C. Agencies shall state in the Notice of Intended Regulatory Action whether they plan to  
33 hold a public hearing on the proposed regulation after it is published. Agencies shall hold such  
34 public hearings if required by basic law. If the agency states an intent to hold a public hearing  
35 on the proposed regulation in the Notice of Intended Regulatory Action, then it shall hold the  
36 public hearing. If the agency states in its Notice of Intended Regulatory Action that it does not  
37 plan to hold a hearing on the proposed regulation, then no public hearing is required unless,  
38 prior to completion of the comment period specified in the Notice of Intended Regulatory Action  
39 (i) the Governor directs the agency to hold a public hearing or (ii) the agency receives requests  
40 for a public hearing from at least 25 persons.

41 D. Public participation guidelines for soliciting the input of interested parties in the  
42 formation and development of its regulations shall be developed, adopted and utilized by each  
43 agency pursuant to the provisions of this chapter. The guidelines shall set out any methods for  
44 the identification and notification of interested parties, and any specific means of seeking input  
45 from interested persons or groups that the agency intends to use in addition to the Notice of  
46 Intended Regulatory Action. The guidelines shall set out a general policy for the use of  
47 standing or ad hoc advisory panels and consultation with groups and individuals registering  
48 interest in working with the agency. Such policy shall address the circumstances in which the  
49 agency considers the panels or consultation appropriate and intends to make use of the panels  
50 or consultation.

51 E. In formulating any regulation, including but not limited to those in public assistance  
52 and social services programs, the agency pursuant to its public participation guidelines shall  
53 afford interested persons an opportunity to submit data, views, and arguments, either orally or  
54 in writing, to the agency or its specially designated subordinate. However, the agency may  
55 begin drafting the proposed regulation prior to or during any opportunities it provides to the  
56 public to submit comments.

57 F. In the case of all regulations, except those regulations exempted by §§ 2.2-4002, 2.2-  
58 4006, or ~~§~~ 2.2-4011, the proposed regulation and general notice of opportunity for oral or  
59 written submittals as to that regulation shall be published in the Virginia Register of  
60 Regulations in accordance with the provisions of subsection B of § 2.2-4031. In addition, the  
61 agency may, in its discretion, (i) publish the notice in any newspaper and (ii) publicize the  
62 notice through press releases and such other media as will best serve the purpose and subject  
63 involved. The Register and any newspaper publication shall be made at least 60 days in  
64 advance of the last date prescribed in the notice for such submittals. All notices, written  
65 submittals, and transcripts, summaries or notations of oral presentations, as well as any  
66 agency action thereon, shall be matters of public record in the custody of the agency.

67 G. If an agency wishes to change a proposed regulation before adopting it as a final  
68 regulation, it may choose to publish a revised proposed regulation provided the latter is subject  
69 to a public comment period of at least 30 additional days and the agency complies in all other  
70 respects with this section.

71 H. Before delivering any proposed regulation under consideration to the Registrar as  
72 required in subsection I, the agency shall deliver a copy of that regulation to the Department of  
73 Planning and Budget. In addition to determining the public benefit, the Department of Planning  
74 and Budget in coordination with the agency, shall, within 45 days, prepare an economic impact  
75 analysis of the proposed regulation. The economic impact analysis shall include, but need not  
76 be limited to, the projected number of businesses or other entities to whom the regulation  
77 would apply; the identity of any localities and types of businesses or other entities particularly

78 affected by the regulation; the projected number of persons and employment positions to be  
79 affected; the impact of the regulation on the use and value of private property; and the  
80 projected costs to affected businesses, localities or entities to implement or comply with the  
81 regulations, including the estimated fiscal impact on such localities and sources of potential  
82 funds to implement and comply with such regulation. The economic impact analysis shall  
83 differentiate between small businesses and other businesses identified; estimate the projected  
84 reporting, recordkeeping and other administrative costs required for compliance by such small  
85 businesses with the regulation; and include a description of any alternative method for  
86 achieving the purpose of the regulation while minimizing adverse impact on small businesses.  
87 Agencies shall provide the Department with such estimated fiscal impacts on localities and  
88 sources of potential funds. The Department may request the assistance of any other agency in  
89 preparing the analysis. The Department shall deliver a copy of the analysis to the agency  
90 drafting the regulation, which shall comment thereon as provided in subsection I, and a copy to  
91 the Registrar for publication with the proposed regulation. No regulation shall be promulgated  
92 for consideration pursuant to subsection I until the impact analysis has been received by the  
93 Registrar. For purposes of this section, the ~~term~~ terms (i) "locality, business, or entity  
94 particularly affected" means any locality, business, or entity that bears any identified  
95 disproportionate material impact that would not be experienced by other localities, businesses,  
96 or entities and (ii) "small business" means a business entity, including its affiliates, that (a) is  
97 independently owned and operated and (b) employs fewer than 500 full-time employees or has  
98 gross annual sales of less than \$6 million. The analysis shall represent the Department's best  
99 estimate for the purposes of public review and comment on the proposed regulation. The  
100 accuracy of the estimate shall in no way affect the validity of the regulation, nor shall any  
101 failure to comply with or otherwise follow the procedures set forth in this subsection create any  
102 cause of action or provide standing for any person under Article 5 (§ 2.2-4025 et seq.) of this  
103 chapter or otherwise to challenge the actions of the Department hereunder or the action of the  
104 agency in adopting the proposed regulation.

105 I. Before promulgating any regulation under consideration, the agency shall deliver a  
106 copy of that regulation to the Registrar together with a summary of the regulation and a  
107 separate and concise statement of (i) the basis of the regulation, defined as the statutory  
108 authority for promulgating the regulation, including an identification of the section number and  
109 a brief statement relating the content of the statutory authority to the specific regulation  
110 proposed; (ii) the purpose of the regulation, defined as the rationale or justification for the new  
111 provisions of the regulation, from the standpoint of the public's health, safety or welfare; (iii) the  
112 substance of the regulation, defined as the identification and explanation of the key provisions  
113 of the regulation that make changes to the current status of the law; (iv) the issues of the  
114 regulation, defined as the primary advantages and disadvantages for the public, and as  
115 applicable for the agency or the state, of implementing the new regulatory provisions; and (v)  
116 the agency's response to the economic impact analysis submitted by the Department of  
117 Planning and Budget pursuant to subsection H. Any economic impact estimate included in the  
118 agency's response shall represent the agency's best estimate for the purposes of public review  
119 and comment, but the accuracy of the estimate shall in no way affect the validity of the  
120 regulation. Staff as designated by the Code Commission shall review proposed regulation  
121 submission packages to ensure the requirements of this subsection are met prior to publication  
122 of the proposed regulation in the Register. The summary; the statement of the basis, purpose,  
123 substance, and issues; the economic impact analysis; and the agency's response shall be  
124 published in the Virginia Register of Regulations, together with the notice of opportunity for oral  
125 or written submittals on the proposed regulation.

126 J. When an agency formulating regulations in public assistance and social services  
127 programs cannot comply with the public comment requirements of subsection F due to time  
128 limitations imposed by state or federal laws or regulations for the adoption of such regulation,  
129 the Secretary of Health and Human Resources may shorten the time requirements of  
130 subsection F. If, in the Secretary's sole discretion, such time limitations reasonably preclude  
131 any advance published notice, he may waive the requirements of subsection F. However, the

132 agency shall, as soon as practicable after the adoption of the regulation in a manner consistent  
133 with the requirements of subsection F, publish notice of the promulgation of the regulation and  
134 afford an opportunity for public comment. The precise factual basis for the Secretary's  
135 determination shall be stated in the published notice.

136 K. If one or more changes with substantial impact are made to a proposed regulation  
137 from the time that it is published as a proposed regulation to the time it is published as a final  
138 regulation, any person may petition the agency within 30 days from the publication of the final  
139 regulation to request an opportunity for oral and written submittals on the changes to the  
140 regulation. If the agency receives requests from at least 25 persons for an opportunity to  
141 submit oral and written comments on the changes to the regulation, the agency shall (i)  
142 suspend the regulatory process for 30 days to solicit additional public comment and (ii) file  
143 notice of the additional 30-day public comment period with the Registrar of Regulations, unless  
144 the agency determines that the changes made are minor or inconsequential in their impact.  
145 The comment period, if any, shall begin on the date of publication of the notice in the Register.  
146 Agency denial of petitions for a comment period on changes to the regulation shall be subject  
147 to judicial review.

148 L. In no event shall the failure to comply with the requirements of subsection F be  
149 deemed mere harmless error for the purposes of § 2.2-4027.

150 M. This section shall not apply to the issuance by the State Air Pollution Control Board  
151 of variances to its regulations.

152 § 2.2-4007.1. Regulatory flexibility for small businesses; periodic review of regulations.  
153 A. In addition to the requirements of § 2.2-4007, prior to the adoption of any proposed  
154 regulations, an agency shall prepare a regulatory flexibility analysis in which the agency shall  
155 consider utilizing regulatory methods that will accomplish the objectives of applicable law while  
156 minimizing the adverse impact on small businesses. An agency shall consider, at a minimum,  
157 each of the following methods of reducing the impact of the proposed regulation on small  
158 businesses:

- 159 1. The establishment of less stringent compliance or reporting requirements;
- 160 2. The establishment of less stringent schedules or deadlines for compliance or
- 161 reporting requirements;
- 162 3. The consolidation or simplification of compliance or reporting requirements;
- 163 4. The establishment of performance standards for small businesses to replace design
- 164 or operational standards required in the proposed regulation; and
- 165 5. The exemption of small businesses from all or any part of the requirements contained
- 166 in the proposed regulation.
- 167 B. In addition to the requirements of § 2.2-4017, on or before July 1, 2009, an agency
- 168 shall review its regulations to determine whether they should be continued without change or
- 169 be amended or repealed, consistent with the stated objectives of applicable law, to minimize
- 170 the economic impact of regulations on small businesses.
- 171 If the agency head determines that completion of the review of existing regulations is
- 172 not feasible by July 1, 2009, the agency shall publish a statement certifying that determination.
- 173 An agency may extend the date required by this subsection in increments of one year, not to
- 174 exceed a total of five years.
- 175 C. In addition, all final regulations adopted after July 1, 2005, shall be reviewed every
- 176 five years to ensure that they minimize the economic impact on small businesses in a manner
- 177 consistent with the stated objectives of applicable law.
- 178 D. The regulatory review required by this section shall include consideration of:
- 179 1. The continued need for the rule;
- 180 2. The nature of complaints or comments received concerning the regulation from the
- 181 public;
- 182 3. The complexity of the regulation;
- 183 4. The extent to which the regulation overlaps, duplicates or conflicts with federal or
- 184 state law or regulation; and

185 5. The length of time since the regulation has been evaluated or the degree to which  
186 technology, economic conditions, or other factors have changed in the area affected by the  
187 regulation.

188 E. For the purposes of this section, the terms "economic impact" and "small business"  
189 mean the same as those terms are described or defined in § 2.2-4007 H.

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